MOTION FILED

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No. [redacted] Misc

In the

SUPREME COURT OF THE UNITED STATES

[redacted] BER TERM, 1965

No. [redacted] Miscellaneous

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

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January ____, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-2780

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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. ....., Miscellaneous

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

The petitioner moves the Court for leave to file the annexed petition for writ of prohibition and/or mandamus under Section 1651 of Title 28, United States Code, directed against the Judicial Council of the Tenth Circuit of the United States restraining it from exceeding its jurisdictional powers in issuing an Order stripping the petitioner of his power and authority to try or otherwise take action in

cases and proceedings filed or instituted in the United States District Court for the Western District of Oklahoma, and directing the vacation of such Order, and for such other and further relief as may be proper.

THOMAS J. KENAN

Counsel for Petitioner

January, 1966

In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. ....., Miscellaneous

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS RESTRAINING THE RESPONDENT, THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, FROM EXCEEDING ITS JURISDICTIONAL POWERS IN ISSUING AN ORDER STRIPPING THE PETITIONER OF HIS POWER AND AUTHORITY TO TRY OR OTHERWISE TAKE ACTION IN CASES AND PROCEEDINGS FILED OR INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, AND DIRECTING THE VACATION OF SUCH ORDER

Petitioner prays that a writ of prohibition and/or mandamus issue to restrain the resopndent from exceeding its jurisdictional power in ordering that, until its further

order, the petitioner shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma, that all cases and proceedings then assigned to or pending before him shall be reassigned to and among the other judges of said Court, and that until the further order of respondent no cases or proceedings filed or initiated in said Court shall be assigned to him for any action whatsoever; and petitioner further prays that said writ issue to direct the vacation of such order.

OPINION BELOW

The opinion of the respondent, the Judicial Council of the Tenth Circuit of the United States, is not reported but is contained in its Order *In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* Special Session, December, 1965. The Order is printed as Exhibit A of the Appendix.

JURISDICTION

The respondent's Order was made on December 13, 1965, filed in the United States Court of Appeals for the Tenth Circuit, on December 27, 1965, and served on petitioner and filed in the United States District Court for the Western District of Oklahoma on December 28, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1651(a), and under the Court's inherent powers.

The following decisions, interpreting the more limited common law writ jurisdiction of this Court which existed

before the Act of June 25, 1948, 62 Stat. 944, are strengthened by that enactment and sustain the power and jurisdiction of the Court to issue the desired writ:

—*United States Alkali Export Ass'n Inc.* v. *United States*, 325 U.S. 196 (1945);

DeBeers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212 (1945).

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue a writ of prohibition and/or mandamus, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ" (infra, pp. 12-14).

QUESTIONS PRESENTED

1. When a Judicial Council orders a federal district judge to take no action whatsoever in any case or proceeding then or thereafter pending in the federal district judge's court, has the Judicial Council exceeded its jurisdictional authority as conferred by 28 U.S.C. § 332?

2. When a Judicial Council acts to strip from a federal district judge all of his power and authority to try or otherwise take action in cases or proceedings then or thereafter pending in his court, has the Judicial Council exceeded the constitutional powers inhering in the Judiciary and infringed upon the powers of the Congress relating to impeachment of officers of the Federal Government, as set forth in Article I, Section 2, clause 5; in Article I, Section 3, clauses 6 and 7; and in Article III, Section 1?

3. When a Judicial Council's order, stating a federal district judge is either unable or unwilling to discharge efficiently the duties of his office and withdrawing from him his right to hear and take action in cases or proceedings then or thereafter pending in his court, is issued after a secret meeting affording the judge neither notice nor opportunity to hear or challenge the matters discussed or to present evidence in his own behalf and defense, or to be represented by counsel, has the Judicial Council afforded the federal district judge the protection guaranteed by the due process clause of Amendment V to the Constitution of the United States?

4. If a Judicial Council is enabled by 28 U.S.C. § 332 to strip a federal district judge of his power and authority to act in all cases and proceedings then or thereafter before his court, was it a sound exercise of discretion by the Judicial Council of the Tenth Circuit to do so in the circumstances of the present case? More particularly, can such drastic action by a Judicial Council be grounded upon the fact that a federal district judge has been named a party defendant in civil and criminal litigation during the last four years, even though there was no culpability, and because two proceedings have been brought in a court of appeals to disqualify him from handling specific litigation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are as follows:

1. Article I, Section 2, clause 5

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

2. Article I, Section 3, clauses 6 and 7

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath of Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

3. Article III, Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

4. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutes involved are as follows:

1. 28 U.S.C., § 1651(a), 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C., 1940 ed., § 377, 36 Stat. 1162

The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

---

3. 28 U.S.C., § 332, 62 Stat. 902

4. 28 U.S.C., 1940 ed., § 448 (Mar. 3, 1911, c. 231, § 306, as added Aug. 7, 1939, c. 501, § 1, 53 Stat. 1223

The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

The council shall be known as the Judicial Council of the circuit.

The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior circuit judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

5. 28 U.S.C., § 372, as amended Feb. 10, 1954, 68 Stat. 13, and Sept. 2, 1957, 71 Stat. 586

See Exhibit B of the Appendix.

6. 28 U.S.C., § 136(d) and (e), 62 Stat. 897

See Exhibit B of the Appendix.

7. 28 U.S.C., § 137, 62 Stat. 897

See Exhibit B of the Appendix.

STATEMENT OF THE CASE

On December 13, 1965, the Judicial Council of the Tenth Circuit of the United States met in special session at Denver, Colorado.

The purpose of the special session, according to an Order (Exhibit A of the Appendix) made at the Session, was to review the effect of Chief Judge Stephen Chandler on the business of the United States District Court for the Western District of Oklahoma.

Judge Chandler was given no notice of the calling of the Special Session or of its purpose. He was given no opportunity to be present during the deliberations of the Special Session, no opportunity to hear the nature of any complaint about him, no opportunity to rebut complaints, cross-examine accusers, or present explanations or evidence in his own behalf, and no opportunity to be represented at the Special Session by counsel.

The Judicial Council, at its special session, made an Order (Exhibit A of the Appendix) finding that Judge

Chandler was presently unable or unwilling to discharge efficiently the duties of his office. The Order stated that, until the further order of the Judicial Council, Judge Chandler was stripped of his power and authority to hear and decide cases or take any action whatsoever in all cases or proceedings then or thereafter pending in his Court.

The Order cited, as specific reasons justifying this finding and Order, that during the past four years Judge Chandler had been a party defendant in both civil and criminal litigation, of which one civil case was still pending, and that two proceedings had been brought in a United States Court of Appeals to disqualify Judge Chandler from handling specific litigation, in one of which proceedings he was ordered to proceed no further and in the other proceeding the matter was still pending.

Other than these specific reasons, nothing was cited to justify the Order except a vague reference to "the entire situation" and to "the attitude and conduct of Judge Chandler" as they affect the business of his Court.

The Order was not filed, made public or its terms made known to Judge Chandler for two weeks, although rumors of the entry of a punitive order circulated. It was finally filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1965, and in the United States District Court for the Western District of Oklahoma on December 28, 1965. Four of the five Judicial Council judges present at the December 13 Special Session signed the Order.

The unprecedented Order created a sensation in the press and evoked considerable commentary by newspaper editors, television reporters and commentators, Members

of Congress, and members of the bar (Exhibit C of the Appendix). Much of this commentary, particularly that in the major newspapers of Judge Chandler's State of Oklahoma severely damaged his prestige, standing, and reputation, in that it quite naturally assumed that Judge Chandler must be derelict in the discharge of his duties as a federal district judge.

REASONS FOR GRANTING THE WRIT

1. Relief is available in no other Court in the land. Title 28, Chapters 81 and 83, United States Code, does not specifically confer on this Court or any Court of Appeals of the United States jurisdiction to hear an appeal from a Judicial Council. However, relief to Judge Chandler can come through the extraordinary writs, provided to the Supreme Court and to all courts established by Act of Congress, as set forth in 28 U.S.C. § 1651(a), or through the inherent powers of this Court. Since the Judicial Council of the Tenth Circuit has as its members the Circuit Judges for the Circuit, it would be a futile gesture to petition the Court of Appeals for the Tenth Circuit for relief under 28 U.S.C. § 1651(a).

Ample authority for the Supreme Court to invoke jurisdiction is provided in 28 U.S.C. § 1651(a). Prior to the enactment of the Act of June 25, 1948, c. 646, 62 Stat. 944, there may have been question whether the extraordinary relief prayed for in this petition could be issued by this Court. 28 U.S.C., 1940 ed., § 377, 36 Stat. 1162, provided authority to this Court only to issue all writs *necessary for the exercise of its respective jurisdiction.* See *Ex parte Republic of Peru,* 318 U.S. 578 (1943).

In the Act of June 25, 1948, 62 Stat. 944, the Congress broadened the authority of this Court to issue writs of prohibition and mandamus. 28 U.S.C. § 1651(a) now provides authority to this Court not only to issue all writs *necessary* to its jurisdiction, as of old, but also all writs *appropriate in aid of* its jurisdiction.

Since Judge Chandler sits as a court of first instance—the fact finding court—in cases over which this Court has appellate and review jurisdiction, it would seem no stronger instance could be cited for issuing a writ either "necessary" or "appropriate in aid of" this Court's jurisdiction than the present, which touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction.

2. The writ should be issued because a question of immense public importance is involved and it is peculiarly appropriate that action by this Court should be taken.

Clearly, this revolutionary action of the Judicial Council of the Tenth Circuit is of enormous significance not only to the federal judiciary but to all Americans. The fabric of our political life, the Constitution of the United States, is placed under stress by this Judicial Council action which is equivalent in many ways to an impeachment of a federal judge.

The public importance of the Judicial Council's Order and its implications are evidenced by the widespread interest in this entire matter, of which this Court knows and can take judicial notice and evidence of which is presented in Exhibit C of the Appendix.

3. The writ prayed for should be issued because it is the only expeditious and effective means of confining the Judicial Council of the Tenth Circuit to a lawful exercise of its functions as prescribed by 28 U.S.C. § 332. This is not an instance of mere error but of usurpation of power. There is urgent business before Judge Chandler's court, and he can serve the litigants of the district only if this Court removes the Order creating confusion in his court by purporting to rob him of his authority and power, in effect, his office.

4. The writ prayed for should be issued in order to preserve Judge Chandler's constitutional rights of due process of law, set forth in Amendment V of the Constitution of the United States, and denied him in the Star Chamber proceeding of the Judicial Council on December 13, 1965. All citizens are entitled to due process of law, but there is an immense public interest in the preservation of this standard as it respects the manner in which a Judicial Council cracks the whip over a federal district judge and eviscerates him of his judicial powers.

ARGUMENT

The Judicial Council of the Tenth Circuit had no jurisdiction to strip Judge Chandler of his powers to act in cases or proceedings then or thereafter pending in his court. The Judicial Council cited, as the source of its power and authority to so act, the Act of June 25, 1948, 62 Stat. 902, 28 U.S.C. § 332. But the legislative history of this Act reveals clearly that the Congress never intended to endow Judicial Councils with such despotic powers over their judicial brethern.

It should initially be noted that the Act of June 25, 1948, 62 Stat. 902 was only a revision of Title 28, United States Code, was not intended to change the law existing then but only to organize it better to eliminate obsolete or revoked statutes, and to clarify any awkwardly expressed but understood intentions. House Report No. 308, 80th Congress.

The true legislative history of 28 U.S.C. § 332 is that of the Act of August 7, 1939, 53 Stat. 1223, which had as its purpose the establishment of the Administrative Office of the United States Courts and contained in its Section 306 the forerunner of today's 28 U.S.C. § 332.

The report of the Senate Committee on the Judiciary, Senate Report No. 426, 76th Congress, which accompanied the 1939 legislation, clearly shows that its main purpose was to transfer from the Attorney General to a newly created Administrative Office of the United States Court the burden of administration over every petty detail affecting the federal courts and that its second purpose was to provide administrative machinery whereby the lagging work of the courts could be expedited and kept up to date.

Senate Report No. 426, 76th Congress, and Section 306 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, both tie the work of the Judicial Councils to the data-collecting and statistics-compiling duties of the Administrative Office of the United States Courts, and they tie the directive power of the Judicial Councils over district judges to the correction of the delays and the administrative criticisms revealed in the quarterly reports of the Administrative Office.

This is far from the tyrannical powers the respondent arrogated to itself when it issued its purported Order against Judge Chandler.

It should further be noted that when the revisory legislation of 1948 was enacted, the revisers drastically altered the order of thoughts in 28 U.S.C., 1940 ed., § 448, relating to Judicial Councils, and the resulting section, today's 28 U.S.C. § 332, might appear to support plenary disciplinary powers over federal district judges by Judicial Councils (compare statutes, *infra,* pp. 8 and 9). However, the pertinent reviser's note revealed to Members of Congress voting on this revisory legislation only that "changes in phraseology were made" to 28 U.S.C., 1940 ed., § 448. House Report No. 308, 80th Congress. Surely, this lack of notice to the Congress of important restructuring of statutory language could not be the basis for altering the original congressional intention expressed in 1939, which intention by no stretch of the imagination embraced authority for the summary stripping of federal district judges' judicial powers by Judicial Councils.

The Judicial Council of the Tenth Circuit has clearly acted beyond the jurisdictional power given it by its creator, the Congress of the United States, as evidenced by a reading of the legislative history of 28 U.S.C., § 332.

In addition, the Judicial Council has broken through the jurisdictional boundaries imposed upon the entire Judiciary by the Constitution and has penetrated deeply into the constitutional powers of the Congress.

Article I, Section 2, clause 5; and Article I, Section 3, clauses 6 and 7 of the Constitution confer upon the Congress

the sole power of impeaching and trying federal officers for misbehavior. And Article III, Section 1 of the Constitution redoubles and focuses this congressional power in the instance of federal judges by guaranteeing that they shall hold their offices during good behavior. Impeachment by the Congress is the only way to strip a federal district judge of his office.

The Judicial Council, by its Order, has stripped Judge Chandler of his judicial authority and powers and left him only the shell of his office. The Constitution can not be so easily subverted. The office of a federal district judge is not his office space, his desk, his robe hanging in a closet. The judicial powers—the authority to take action in cases and proceedings in his court—are a judge's office. The Judicial Council has removed Judge Chandler's office from him, and it thereby transgressed the impeachment powers of the Congress and deprived Judge Chandler of his Constitutional rights under Article III, Section 1.

Judge Chandler was deprived of other constitutional rights, those guaranteed every citizen by the due process of law clause of Amendment V to the Constitution. He was deprived of liberty and property by secret and summary procedures so shocking that they recall those of the British Star Chamber.

He received no notice of the Judicial Council's special session, was not advised of the nature of the charges or complaints made against him, was not allowed to be present at the meeting, was not allowed to confront and cross-examine his discreditors, if any, was not permitted to present a defense or to be represented by counsel. The Order

which issued from this proceeding attempts to reduce and confine Judge Chandler to a federal judge in name only. It cracks the whip and tells him what he can and cannot do. It attempts to take from him the meaning and worth and powers of his office.

This Court has held that government employment in the Executive Branch is not property within the protection of this clause of Amendment V of the Constitution. *Bailey* v. *Richardson,* 182 F.2d 46 (1950), *affirmed* 341 U.S. 918. But Judge Chandler neither is an employee nor has he been removed from office. He, as a *person,* still holds his office, and attempts to deprive him of the liberties and properties of that office—its powers and authorities—must surely meet the minimum standards of due process set forth in Amendment V to the Constitution. As a constitutional minimum, in the absence of explicit authorization from the Congress, the Judicial Council could not deprive Judge Chandler of the worth of his office in a proceeding that does not afford him rudimentary due process. See *Greene* v. *McElroy,* 360 U.S. 474 (1959).

Finally, if this Court should find that Judicial Councils are entitled under the Constitution and the enactments of the Congress to summarily strip federal district judges of their judicial powers, it is wholly unfitting that the basis for such could be that set forth in the respondent's Order.

Of what significance is it that Judge Chandler was unfortunate enough to be a defendant in civil and criminal actions? Any person can be hauled into court as a defendant. The criterion is culpability.

In the criminal action referred to by the Judicial Council, a misdemeanor action, the Oklahoma State District Judge found that the evidence presented to the Grand Jury was insufficient to show that a crime had been committed, that no crime has been committed by Judge Chandler, and he sustained a Motion to Quash the Indictment. (Exhibit D of the Appendix.)

It is inconceivable that this could in any way justify the removal of Judge Chandler's powers. Yet respondent mentioned this criminal action as supporting its Order.

Judge Chandler has been named a defendant in two civil actions, both brought by the same plaintiff, a lawyer disbarred by both Judge Chandler and the Supreme Court of Oklahoma. Both actions were defamation actions arising out of Judge Chandler's official action. The first was decided in favor of Judge Chandler and affirmed on appeal by the Court of Appeals for the Tenth Circuit. *O'Bryan* v. *Chandler,* U. S. District Court for the Western District of Oklahoma, No. 63-339, decided July 1, 1964, *affirmed* — F.2d — (10th Cir., 1965) (Exhibit E of the Appendix). The second civil action was filed December 8, 1965, in a state court and involves generally the same matter as was presented in the first civil action. Defendant Judge Chandler has until January 7, 1966, to answer the plaintiff in the State Court.

The two disqualification proceedings brought in the Court of Appeals for the Tenth Circuit are *Occidental Petroleum Corporation* v. *Hon. Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* 303 F.2d 55 (10th Cir., 1962), *cert. denied* 372 U.S. 915

(1963), in which litigation Judge Chandler was disqualified, and *Texaco, Inc.* v. *Hon. Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma,* No. 8216, — F.2d —, (10th Cir., 1965) (Exhibit F of the Appendix), decided December 27, 1965, unfavorable to Judge Chandler, who is now preparing to petition this Court for an appropriate writ. In both proceedings, petitioner believes the Court of Appeals had no more jurisdiction to act than did the Judicial Council in issuing its Order removing him from all cases, present and future.

Yet these two strange disqualification proceedings, together with an exoneration of misdemeanor charges in a criminal action and a successful defense in a civil action which the defeated plaintiff is attempting to resume, are made the basis by the Judicial Council of peremptorily disqualifying Judge Chandler from acting in any and all proceedings, now or hereafter, in his court.

It is a monstrous violation of traditional American concepts of justice that a person's successful defense in civil or criminal actions should be cited by a judicial body as proof of his unfitness. It is manifestly improper that two specific disqualification instances in over twenty-two years on the bench could provide alone the basis for stripping Judge Chandler of his powers. Whatever policing powers Judicial Councils may have over federal district judges, an attempt to stretch them to the extent of the instant case for the cited reasons is so unwarranted, astonishing and excessive that this Court must act summarily to counter their effect.

CONCLUSION

For the foregoing reasons, this petition for a writ of prohibition and/or mandamus should be granted.

Respectfully submitted,

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APPENDIX

EXHIBIT A

FILED
DEC 28 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

DUPLICATE ORIGINAL

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES

SPECIAL SESSION - DECEMBER, 1965

IN THE MATTER OF THE HONORABLE)
STEPHEN S. CHANDLER, UNITED)
STATES DISTRICT JUDGE FOR THE)
WESTERN DISTRICT OF OKLAHOMA)

ORDER

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on December 13, 1965. Council members present were:

Judge John C. Pickett
Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

[APPENDIX]

Absent from the meeting was Chief Judge Alfred P. Murrah who did not attend because he had previously disqualified himself from participating in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

In the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. During that period Judge Chandler has been a party defendant in both civil and criminal litigation. One civil case is still pending. Two proceedings have been brought in the United States Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation. In one instance he was ordered to proceed no further and the other is still pending.

From a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made.

Accordingly, pursuant to the power and authority vested in the Judicial Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332, it is ORDERED that until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now as-

signed to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.

It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

An original copy of this order shall be retained in the records of the Judicial Council. A duplicate original shall be forthwith transmitted to the Clerk of the United States District Court for the Western District of Oklahoma. A copy hereof, properly certified by the secretary of the Judicial Council, shall be sent to the United States Marshal for the Western District of Oklahoma for service by him or his deputy on the Honorable Stephen S. Chandler. The Marshal, or his deputy, making such service shall make and file with the secretary of the Judicial Council a return showing the place and time of such service.

Done by the Judicial Council of the Tenth Circuit at Denver, Colorado, this 13 day of December, 1965.

/s/ John C. Pickett
Circuit Judge
/s/ Jean S. Breitenstein
Circuit Judge
/s/ Delmas C. Hill
Circuit Judge
/s/ Oliver Seth
Circuit Judge

EXHIBIT B

28 U.S.C. § 372, as amended Feb. 10, 1954, 68 Stat. 13 and Sept. 2, 71 Stat. 586.

"(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

"Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

"Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, desires to retire under this section, he shall furnish to the President a certificate of disability signed by the Chief Justice of the United States.

"A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

"A judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

"Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

"(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council, of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, or by the chief judge of his court in the case of a judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court."

28 U.S.C. § 136 (d) and (e), 62 Stat. 897.

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as district judge, he may so certify to the Chief Justice of the United States, and thereafter the district judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the district court.

"(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the dis-

trict judge in active service, present in the district and able and qualified to act, who is next in precedent."

28 U.S.C. § 137, 62 Stat. 897.

"The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders."

EXHIBIT C

The Oklahoma Journal

Oklahoma City, Oklahoma Tuesday, December 28, 1965

CHANDLER'S JUDICIAL POWERS STRIPPED, SOURCES REPORT

Judge To Get Orders Today

By BABS FENWICK

U. S. District Judge Stephen S. Chandler has been stripped of his judicial powers in a secret order issued by the 10th Circuit Judicial Council, sources said Monday.

The order is expected to be filed in Oklahoma City's U.S. district court clerk's office Tuesday, thus becoming public record.

Sources said the council last week issued Chandler an ultimatum either to retire or to have his entire caseload taken from him.

COUNCIL MEMBERS, who also make up the 10th Circuit Court of Appeals in Denver, Monday formally removed the 65-year-old judge from hearing the $25 million Hirshfield vs. Texaco case.

Removing Chandler from hearing any and all cases in the Western District of Oklahoma is an unprecedented council order, sources said.

One source indicated the order also may limit his powers as chief judge of the district.

"This is an extremely harsh position for them to take—a blanket order taking every case away from him," the source said.

"But if they've got the power to take his cases, they've got the power to reduce his authority as chief judge, too."

After last week's ultimatum to Chandler to resign or

be stripped of powers, one source said the judge considered retirement if allowed to name his successor.

THE CONTROVERSIAL chief judge reportedly sent a prominent Oklahoma City attorney to Washington last week to confer with U.S. Sen. A. S. Mike Monroney.

Monroney would name the new judge if a vacancy occurred.

Chandler reportedly sent word to Monroney he would retire if a specific Oklahoma County district judge was named to the lifetime, $30,000-a-year federal post.

Monroney refused.

Chandler is known to have counseled with several prominent attorneys on whether he should retire or fight the council's order.

ONE ATTORNEY SAID Chandler has several recourses. He may file an application before the U.S. Supreme Court asking the high court to prohibit the council from enforcing the order.

Or, the judge can take the issue to the U.S. Congress. "Congress has the sole power of impeachment," a source said, "and the effect of taking his cases away is so monumental, that the order may be encroaching on congressional powers."

The judiciál council order was reportedly issued Friday. However, the order does not become public record until filed with the district court it affects.

One source indicated the order might be more encompassing than expected. He said the council, to force Chandler's retirement, could recommend he be made a junior judge, similar to the procedure used for U.S. District Judge Ross Rizley.

EARLIER THIS YEAR, the council recommended to President Johnson that Rizley be certified as physically disabled and that a new judgship post be created. It was filled by Judge Luther Eubanks.

By statute, the council may recommend that the powers of a judge be reduced or taken on by another judge on grounds of physical or mental disability or moral turpitude.

Several attorneys close to Chandler indicated they

question the council's authority to issue a blanket order excluding a judge from hearing all cases.

Law provides that the council, which has general superintending powers over 10th Circuit district court judges, may take whatever action necessary for the proper administration of justice.

SOURCES CLOSE to Chandler indicate the judge will not retire. He has been on the federal bench 22 years and has been eligible for retirement at full pay for 12 years. The law allows him to remain as chief judge until the age of 70—five years from now.

The council's order is only one of several controversies that has hit the federal judge this year.

Attorneys for Texaco asked and got Monday the circuit court to disqualify Chandler from hearing the case on the grounds that one of the lawyers involved worked for him last year.

The order disqualifying Chandler, entered Monday, said that presiding Circuit Court Judge A. P. Murrah would be empowered to appoint another judge to the Hirshfield vs. Texaco case.

The Oklahoma Journal, Tuesday, December 28, 1965

Chandler

(Continued From Page 1)

MURRAH SAID IT would be next week before he designated a new judge. It was not known if the case would be assigned to one of the other Oklahoma City federal judges or an out-of-state judge in the 10th Circuit.

Murrah, who presides over the court and the council, disqualified himself from hearing the Chandler matters. The order taking the Texaco case from Chandler was concurred in by Judges Lewis, Pickett, Breitenstein, Seth and Hill.

All five are council members.

—x—

[APPENDIX]

TULSA DAILY WORLD

Thursday, December 30, 1965

Lesson For Reformers

ANOTHER sad chapter has been added to Oklahoma's record of judicial misadventure in 1965. Federal District JUDGE STEPHEN S. CHANDLER has been stripped of his duties and powers by the Judicial Council of the 10th Circuit Court of Appeals.

This unusual action is not related to the earlier round of troubles on the bench in Oklahoma, which involved three former Justices of the State State Supreme Court. But it accentuates one problem common to both Federal and State courts—how to remove judges from active duty when they are either unable or unwilling to carry out their responsibilities.

In the case of JUDGE CHANDLER, the Judicial Council has taken the action it deems necessary. But the State has no such machinery, short of impeachment.

After the succession of troubles rising out of our courtrooms in the past year, it is little wonder that judicial reform shapes up as the most talked-about issue in the forthcoming Governors race—and it is bound to come before the 1967 Legislature.

When reforms are discussed or written into law, it is important to find the best possible method of selecting Judges. But some attention also must be given to a means of removing Judges, for either incompetence or disability, in addition to the present cumbersome impeachment procedure.

Even the Federal program does not seem adequate. If JUDGE CHANDLER cannot function as a Judge, we see little reason for him to retain a staff or to occupy a place on the roster of active Judges. It would be

better for him to be retired and replaced by a new appointee able to take his share of the District Court responsibilities. It would be helpful if CHANDLER would take retirement on his own.

The CHANDLER case also serves to remind us that mere appointment of Judges is no automatic guarantee of a trouble-free bench. All Federal Judges are appointed by the PRESIDENT, usually on recommendation by one or more U.S. Senators.

The sober fact is that there is no method of selecting Judges that comes with any kind of guarantee. The human factor, if nothing else, would make that impossible.

What the State of Oklahoma must do is keep an open mind, search painstakingly for the best-proven system of selecting Judges and move quickly to carry it out. And the system ought to include machinery for removal as well.

EXHIBIT D

FILED, DISTRICT
COURT, OKLAHOMA
COUNTY, OKLA.
Dec. 9, 8:17 A.M., '65
DALE SMITH
Court Clerk
By (Name illegible)
Deputy

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
-VS-	)	
	)	No. 31299
STEPHEN CHANDLER and EDWIN LEE KESSLER, Defendants.	)	

ORDER

This matter comes on for hearing on the 22nd day of November, 1965, before the undersigned District Judge, duly assigned by the Chief Justice of The Supreme Court of the State of Oklahoma to hear said cause; the State of Oklahoma appearing by and through D. K. Cunningham, Assistant County Attorney; the defendant, Stephen Chandler, appearing in person and by and through his attorneys of record, John M. Sheehan, J. Howard Edmondson and Sam H. Lattimore; and the defendant, Edwin Lee Kessler, appearing in person and by and through his attorneys of record, James H. Harrod and Ted R. Elliott.

Whereupon, The Court proceeded to hear argument of counsel on the motion of the plaintiff, State of Oklahoma, to continue said hearing, and The Court being advised in the premises finds that said motion to continue hearing should be overruled.

IT IS THEREFORE ORDERED that the Motion for Continuance of the plaintiff, State of Oklahoma, is overruled, to which the plaintiff excepts and exceptions are allowed.

Whereupon, the matter comes on for further hearing upon the separate motions to quash the indictment filed by each of the defendants, Stephen Chandler and Edwin Lee Kessler. The Court proceeded to hear testimony of witnesses called by each defendant in support of said motions, and the matter being continued from day to day and further testimony heard on the 23rd, 24th and 26th days of November, 1965.

Now, on this 26th day of November, 1965, The Court having heard testimony of each of said defendants and said defendants having rested their case in support of their separate Motions to Quash the Indicement, and the State having announced in open court that it did not desire to put on evidence and therefore rested its case, The Court, after hearing argument of counsel and being fully advised in the premises, finds that the evidence presented to the Grand Jury was insufficient to show that the crime of Conspiracy to Cheat and Defraud the State of Oklahoma has been committed, as charged in the indictment and that no crime has been committed by the defendants or either of them, and that the Motion to Quash the Indictment of each defendant should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by The Court that the Motion to Quash the Indictment filed herein by the defendant, Stephen Chandler, is sustained, that defendant Stephen Chandler is hereby ordered discharged and his bond exonerated.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by The Court that the Motion to Quash the Indict-

ment filed herein by the defendant, Edwin Lee Kessler, is sustained, that defendant Edwin Lee Kessler is hereby ordered discharged and his bond exonerated.

To all of which the plaintiff, State of Oklahoma, excepts and exceptions are allowed.

/s/ Donald E. Powers
Donald E. Powers,
Assigned Judge of the District Court

I, DALE SMITH, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 3 day of Jan., 1966.

DALE SMITH, Court Clerk
By Richard Morris, Deputy

EXHIBIT E

FILED
United States Court of Appeals
Tenth Circuit
NOV 30 1965
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7907—November Term, 1965

W. H. PAT O'BRYAN, Appellant,	)	
Vs.	)	Appeal From The United States District Court
STEPHEN S. CHANDLER, Appellee.	)	For The Western District of Oklahoma.

Reagan M. Martin, Dallas, Texas, for Appellant.

Granville Tomerlin, Oklahoma City, Oklahoma, for Appellee.

Brief of the United States as Amicus Curiae, John W. Douglas, Assistant Attorney General; Morton Hollander and David L. Rose, Attorneys, Department of Justice, Washington, D.C.

Brief for the Oklahoma Bar Association as Amicus Curiae, Roy C. Lyttle and William D. Curlee, Oklahoma City, Oklahoma.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

W. H. Pat O'Bryan, an Oklahoma attorney and Certified Public Accountant, instituted this action against Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to recover damages, actual and punitive, for alleged malicious prosecution, libel and slander,[1] arising out of certain activities of Judge Chandler before a grand jury, which resulted in a criminal indictment against O'Bryan. This is an appeal from an order dismissing the complaint on the grounds that the alleged misconduct of Judge Chandler was not clearly in the absence of his jurisdiction as a Judge, and that he therefore was judicially immune from civil liability.

It is settled doctrine that a Judge is not liable in damages for acts performed in a judicial capacity unless there is a "clear absence of all jurisdiction" over the subject matter. This is true, even though the Judge's acts are in excess of his jurisdiction and done maliciously, corruptly, or arbitrarily. Bradley v. Fisher, 13 Wall 335. This court, in Ryan v. Scoggin, 245 F.2d 54, 58, announced the rules in these words:

> "It is a principle of universal acceptation in its relation to judges at all levels that a judge is not liable in damages resulting from an order entered or a judgment rendered in an action or proceeding over which the court has jurisdiction of the subject matter and of the parties, even though such order or judgment is in excess of the vested jurisdiction, or is otherwise erroneous and is set aside or reversed on appeal or other review. That deep-seated fundamental rule of ancient origin and frequent repetition rests upon con-

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[1] The action was brought in the District Court of Oklahoma City, Oklahoma, and timely removed to the United States District Court for the Western District of Oklahoma upon petition of Judge Chandler, under the provisions of 28 U.S.C. § 1442.

> siderations of public policy that such immunity is a concomitant of an independent judiciary which is indispensable to the well-being of a free people. * * * (Citing cases). It is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act. * * *"

See, also, Barr v. Mateo, 360 U.S. 564; Gregoire v. Biddle, 2 Cir., 177 F.2d 579, cert. denied 339 U.S. 949; Brictson v. Woodrough, 8 Cir., 164 F.2d 107[2], cert. denied 334 U.S. 849.

It is, of course, the general rule that in considering a motion to dismiss for failure of the complaint to state a cause of action, that all facts well pleaded are admitted. Ryan v. Scoggin, supra. The material allegations of the complaint, and exhibits attached thereto, show that O'Bryan had filed a claim for more than one million dollars in a bankruptcy proceeding known as the "Selected Investments case,"[3] then pending in Judge Chandler's court. At a hearing in the bankruptcy proceedings, O'Bryan first supported the claim with oral testimony; he later produced a letter contract in support of his claim. The court found the claim to be fraudulent, disallowed it, and required O'Bryan to return $5,000 to the Trustee in Bankruptcy.

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[2] The Brictson case was heard in the 8th Circuit before a panel of judges from the 10th Circuit, sitting by assignment.

[3] Matters involving the Selected Investments Corporation bankruptcy proceedings have been before this court in a number of cases. Carey v. Selected Investments Corp., 10 Cir., 319 F.2d 578; Burns v. United States, 10 Cir., 286 F.2d 152; Workman v. Harrison, Trustee, 10 Cir., 282 F.2d 693; Selected Investments Corp. v. Duncan, 10 Cir., 260 F.2d 918, cert. denied 359 U.S. 914.

O'Bryan was thereupon disbarred from the practice of law in the United States District Court for the Western District of Oklahoma. The Judge was convinced that the letter contract had been fabricated, that the claim was fraudulent, and that O'Bryan had committed perjury in his attempt to sustain it.

On November 7, 1961 a grand jury was convened in the Western District of Oklahoma where it was qualified by Judge Chandler and given the usual general instructions as to its duties.

It is alleged that when the grand jury had completed consideration of the cases to be presented by the United States District Attorney, Judge Chandler, after having consulted privately with the foreman of the grand jury concerning the O'Bryan matter, appeared personally in the grand jury room at the request of the foreman. Judge Chandler first announced that the room was "a United States Court Room now instead of a Grand Jury Room, to keep you all from having to come upstairs." He advised the grand jury that he was there at the request of the foreman to explain the original instructions and to answer questions submitted by members of the grand jury, and he said that when he left "you can reform as to the Grand Jury." Thereupon the grand jury foreman requested that the Judge furnish certain information which he had concerning O'Bryan's transactions in the Selected Investments Corporation matter. The O'Bryan claim was then explained in detail, including the reasons for its disallowance. The Judge explained that he was not suggesting that any indictment be returned, but that it was his duty to direct the attention of the grand jury to possible violations of criminal laws for investigation. The original instructions were reiterated, and the United States Attorney advised the grand jury that his office stood ready to produce any information that it desired. Thereafter a 2-count indictment

was returned charging O'Bryan with making a false claim in a bankruptcy proceeding and with concealing assets from a trustee in bankruptcy, in violation of 18 U.S.C. § 152. On September 28, 1962, Judge Fred Daugherty of the United States District Court for the Western District of Oklahoma, dismissed the indictment without prejudice, upon the ground that Judge Chandler's activities in the presentation to the grand jury of the O'Bryan matter was a "technical irregularity" which invalidated the indictment.

We cannot agree with O'Bryan's contentions that Judge Chandler's conduct was clearly in absence of any jurisdiction and that his acts were those of a private individual. While it appears that the Judge's method of suggesting that the grand jury investigate the O'Bryan matter may have been unusual, irregular, or even erroneous, there nevertheless was no clear absence of jurisdiction. The grand jury was regularly convened in the United States District Court for the Western District of Oklahoma, of which Judge Chandler was the Chief Judge. Acting in that capacity, he had qualified the grand jury, designated its foreman and deputy foreman, and submitted to it the usual instructions. It was an appendage to the court over which he presided. Brown v. United States, 359 U.S. 41, rehearing denied 359 U.S. 976. The O'Bryan claim had been heard by Judge Chandler in a proceeding pending in his court; that he strongly suspected irregularity in the filing of that claim is understandable. The propriety of his expressions of opinion as to O'Bryan's guilt is questionable; still, the Judge had the power and jurisdiction not only to call attention to what he thought was a violation of the law, but also to direct that available evidence be presented to the grand jury. Arbor v. Blue, 10 Cir., 45 F.2d 746.

After entry of the judgment dismissing the complaint, O'Bryan sought leave to file an amended complaint. The court refused to permit the pleading to be filed. It is con-

tended here that no responsive pleading had been filed, and that Rule 15(a) F.R.Civ.P. authorized the filing as a matter of right.[4] While there are decisions to the contrary,[5] this court has held that the right to amend without leave of the court ends "with the entry of a judgment dismissing the action" and the filing of amended pleadings thereafter is addressed to the sound discretion of the court. Feddersen Motors v. Ward, 180 F.2d 519. Accord: Swan v. Board of Higher Education of the City of New York, 2 Cir., 319 F.2d 56.

The prolix document submitted by O'Bryan as an amended complaint covers twenty pages of the printed record, much of which is completely extraneous matter interposed with scandalous and scurrilous statements. It is an attempt to state a cause of action based upon an alleged conspiracy entered into between Judge Chandler and ten other persons. These ten additional individuals are named as defendants without an order of the court. It appears from the amended complaint that the purpose of the so-called "conspiracy" was to effect a disallowance by Judge Chandler of O'Bryan's claim in the bankruptcy proceeding herein mentioned, and to cause a criminal indictment to be returned against him. The only substantive difference be-

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[4] Rule 15(a), F.R.Civ.P. provides:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires * * *."

[5] Breir v. Northern Calif. Bowling Proprietors' Ass'n, 9 Cir., 316 F.2d 787; Fuhrer v. Fuhrer, 7 Cir., 292 F.2d 140; Peterson Steels v. Seidmon, 7 Cir., 188 F.2d 193; Kelly v. Delaware River Joint Comm'n, 3 Cir., 187 F.2d 93, cert. denied 342 U.S. 812.

tween the allegations in the original complaint and those in the proposed amended complaint is that those same acts complained of in the original complaint are now alleged to be the product of the conspiracy. The proposed amended complaint states that the acts of Judge Chandler were "wrongfully, willfully, knowingly, purposely designedly, fraudulently, maliciously, oppressively and corruptly" performed. These are the same acts for which we have heretofore said Judge Chandler could not be held liable in damages. As the trial Judge states, ". . . the acts of defendant [Chandler] of which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made." This is the gravamen of the original complaint as well as the tendered amended complaint. Allegations that the acts of Judge Chandler were part of a conspiracy would not be sufficient to state a claim upon which relief could be granted if the claim is otherwise barred by the doctrine of judicial immunity. Agnew v. Moody, 9 Cir., 330 F.2d 868, cert. denied 379 U.S. 867; Brictson v. Woodrough, supra. We find no abuse of discretion of the trial Judge in refusing to permit the filing of the amended complaint.

AFFIRMED.

[APPENDIX]

EXHIBIT F

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

FILED
DEC 29 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 8216 - NOVEMBER TERM, 1965

TEXACO, INC., A Delaware Corporation,)
)
Petitioner,)
)
Vs.)
)
HONORABLE STEPHEN S. CHANDLER, CHIEF)
JUDGE FOR THE UNITED STATES DISTRICT)
COURT FOR THE WESTERN DISTRICT OF)
OKLAHOMA,)
)
Respondent.)

George W. Jansen, Los Angeles, California, and Phil E. Daugherty, Oklahoma City, Oklahoma, of the Firm of Ames, Daugherty, Bynum, Black, Ashabranner & Rogers, for Petitioner.

Gus Rinehard, Oklahoma City, Oklahoma, for Respondent.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges, PER CURIAM.

In this mandamus action Texaco Inc. prays for an order directing Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to proceed no further in Hirschfield, et al. v. Texaco, Inc., Civil action No. 64-259, pending in the aforesaid court.

It is alleged that on June 6, 1964, the plaintiffs, Norman Hirschfield, Edward C. Joullian III, and Edward C. Joullian brought the aforesaid action in the United States District Court for the Western District of Oklahoma in which a judgment in the sum of $25,000,000 was sought against the defendant Texaco, Inc. for services rendered; that at the time the action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony;[1] that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John *M.* Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. Judge

---

[1] The O'Bryan action was brought in an Oklahoma State Court. After removal to the United States District Court for the Western District of Oklahoma, it was dismissed on the ground that Judge Chandler was immune from civil liability for the alleged acts of misconduct. The dismissal was affirmed by this court. W. H. Pat O'Bryan v. Chandler, 10 Cir., — F.2d —.

Chandler moved to dismiss this petition for a writ of mandamus, and later filed what was designated a "waiver of Oral Argument and Rejoinder." These documents discuss the proceedings in the Texaco case at length, and we treat them as a response.

After the Texaco case was at issue, there were numerous and lengthy hearings on the question of disqualification, and other matters, relating to the case. Judge Chandler repeatedly stated that he did not intend to try the case, but refused to disqualify himself and assign it to another judge. 28 U.S.C. §455 provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

In Rapp v. Van Dusen, 350 F.2d 806, it was held that this statute disqualified a United States District Judge from proceeding in a civil case pending before him where attorneys for one of the parties had represented the judge in a mandamus action brought to compel the judge to transfer a case under 28 U.S.C. §1404(a). The judge in the mandamus action had no personal interest and was only a nominal party. In that case, at p. 812, the court said:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation."

In the case at bar, Mr. Cantrell was representing Judge Chandler as a defendant in an action wherein the plaintiff sought a $10,000,000 judgment against the Judge as an individual. Confining our decision to the particular facts of this case, we hold that Judge Chandler's connection with one of the attorneys for the plaintiffs in the Texaco case was sufficient to constitute a connection with a "party or his attorney" within the meaning of Section 455.

The jurisdiction of this court to [illegible] action to guarantee a fair and impartial trial is no longer open to question. Upon an adequate showing, this court has held that it has the "power and inescapable duty," whether under the all-writs statute, 28 U.S.C. §1651, or under its inherent powers of appellate jurisdiction, "to effectuate what seems to us to be the manifest ends of justice." United States v. Ritter, 10 Cir., 273 F.2d 30, 32, cert. denied 362 U.S. 950; Occidental Petroleum Corp. v. Chandler, 10 Cir., 303 F.2d 55, cert. denied 372 U.S. 915, Reh. denied 373 U.S. 906.

IT IS THEREFORE ORDERED that the Honorable Stephen S. Chandler, Respondent herein, shall proceed no further in the case of Hirschfield, et al v. Texaco Inc., numbered 64-259 on the Civil Docket of the United States District Court for the Western District of Oklahoma, and that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit.

The Clerk of this Court is hereby directed to transmit forthwith a copy of this order to the Clerk of the United States District Court for the Western District of Oklahoma for filing in the aforesaid case, Civil No. 64-259.